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OMAHA
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May 15, 2003

David L. Wornson, Esq.
Iowa Department of Natural Resources
Wallace State Office Building
Des Moines, IA 50319



RE: Former Manufactured Gas Plant ("MGP") Site at 7th Street between
10th and 11th Avenue, Council Bluffs, Iowa ("Council Bluffs MGP Site")

Dear Mr. Wornson:

This firm represents Omaha Public Power District ("OPPD") of Omaha, Nebraska. Your letter of March 31, 2003 requested a response by OPPD to assertions that OPPD may be liable for alleged environmental contamination at and from the Council Bluffs MGP Site. Your March 31st letter enclosed a July 15, 2002 letter authored by a lawyer representing Aquila, Inc. ("Aquila"), the current owner of a portion of the Council Bluffs MGP Site (hereinafter, the "Aquila Letter"). The Aquila Letter contains the assertion that: "From 1899 through 1928, the [Council Bluffs] MGP was operated by predecessors to the Omaha Public Power District. . . ." (Aquila Letter, p. 3). In my letter to you dated April 17, 2003, I acknowledged receipt of your March 31st letter and the Aquila Letter. I requested copies of the attachments referenced in the Aquila Letter and asked for additional time to submit a response. You provided the attachments with a letter dated May 6, 2003, and requested OPPD's response by the end of May. As explained in this letter, the enclosed OPPD documents establish that OPPD is not a corporate successor of Nebraska Power Company with respect to any properties in Iowa, east of the Missouri River, or any liabilities relating to such properties, including the alleged contamination at the Council Bluffs MGP Site.¹

Aquila apparently contends that in 1946 OPPD purchased the Nebraska Power Company and assumed its obligations. However, it is questionable whether Nebraska Power Company, let

¹ OPPD has, since its inception, owned and operated distribution and related assets in Carter Lake, Iowa, which is on the west side of the Missouri River adjacent to the City of Omaha.

alone any alleged corporate successor, ever had any liability with respect to the Council Bluffs MGP Site. First, it is apparent from the Aquila Letter and its attachments that Nebraska Power Company never owned or operated the Council Bluffs MGP Site. Rather, when Nebraska Power Company was incorporated in 1917, the Council Bluffs MGP Site was owned and operated by Citizens Gas & Electric Company ("CGE"). Aquila contends that CGE continued to own and operate the site from 1917 to 1928 as a *subsidiary* of Nebraska Power Company, but fails to explain how Nebraska Power Company, as the alleged parent, is liable for the activities of a separately incorporated entity which owned and operated the MGP Site. (Aquila Letter, p. 4). Indeed, it is not entirely clear from the attachments to the Aquila Letter when CGE allegedly became a subsidiary of Nebraska Power Company. Second, on June 1, 1928, CGE sold the Council Bluffs MGP Site to Council Bluffs Gas Company. (*Id.*) Aquila alleges that this 1928 sale was an "asset purchase" but I cannot fully respond to that assertion because I did not receive a copy of the agreement referenced as "Tab J" on page 4 of the Aquila Letter. In any event, Council Bluffs Gas Company took over an operating MGP, ran it until it was closed in 1932, and would bear full responsibility for the disposition of MGP equipment and structures and any residual or waste products generated from the MGP process and present on the site as of the time of closure.

According to Aquila, CGE was later renamed Citizens Power and Light Company ("Citizens Power") and was merged into the Nebraska Power Company as of June 1, 1937. (*Id.*) Aquila provides no information as to what obligations, if any, were assumed, or whether CGE/Citizens Power was dissolved as a corporate entity prior to or after the alleged merger. The only evidence submitted by Aquila on this point is a cryptic reference in a 1945 *Moody's Manual of Investments* (Tab K to the Aquila Letter) to CGE being "merged as of June 1, 1937." Even assuming, however, that this merger of a former subsidiary into its parent took place, it did not occur until nine years after the sale of the Council Bluffs MGP Site to Council Bluffs Gas Company. The Supreme Court of Iowa has declared that liability for environmental cleanup under Iowa Code § 455B.392 (1)(a) is limited to the contamination proven to be caused by the alleged liable party. Blue Chip Enterprises v. State of Iowa Department of Natural Resources, 528 NW2d 619, 623-24 (Iowa 1995). Even if it could be established by credible evidence that Nebraska Power Company assumed by merger the liabilities of CGE/Citizens Power with respect to the Council Bluffs MGP Site, there does not appear to be any proof as to the "extent of contamination", if any, caused by CGE/Citizens Power during its operation of the Council Bluffs MGP Site.

Regardless of the potential liability that may have accrued to Nebraska Power Company through the 1937 alleged merger discussed above, OPPD's corporate documents conclusively demonstrate that OPPD did not purchase any Iowa properties of Nebraska Power Company located east of the Missouri River and did not "succeed to" any potential liability of Nebraska Power Company with respect to such properties. Attachment 1 to this letter is a copy of minutes of a special meeting of the Board of Directors of Omaha Public Power District convened on September 5, 1946. Attached to the minutes are two versions of a stock purchase agreement between the Omaha Electric Committee, Inc., a Nebraska nonprofit corporation (the

"Committee") and OPPD. The second copy of the stock purchase agreement is designated as the final version and was entered into on October 19, 1946.

The stock purchase agreement states, in the first recital, that the Committee is the owner of all of the outstanding stock of Nebraska Power Company, which is thereafter referred to in the agreement as "the Company." The stock purchase agreement further states, in paragraph 1, as follows:

- "1. The Committee will organize a new Iowa Company and become the owner of all of its common stock, the only stock to be issued by it, and will transfer to the Iowa Company a portion of the common stock of the Company in exchange for bonds to be issued by the Iowa Company. Thereafter the Committee will vote, and will cause the Iowa Company to vote, for a partial liquidation of the Company to be accomplished by transfer to the Iowa Company of the Iowa properties now owned by the Company and certain other assets and cash existing as of the date of closing allocable to the Iowa properties as may be determined by R. W. Beck and Associates and Haskins & Sells, upon surrender by the Iowa Company of its stock in the Company."

Paragraph 2 of the October 19, 1946 stock purchase agreement states that the Committee would then sell to OPPD, on the closing date (which was December 2, 1946, as described in Attachment 3, *infra*), the remaining outstanding common stock of Nebraska Power Company. Thus, before OPPD purchased any stock of the Nebraska Power Company from the Omaha Electric Committee, the Committee first organized a new Iowa company to which the Committee transferred a portion of the common stock of Nebraska Power Company representing ownership of the Iowa properties.

Attachment 2 to this letter further explains the 1946 transaction relating to the Iowa properties of Nebraska Power Company. This document is the Official Statement of OPPD for a \$42,000,000 bond issue dated February 1, 1947 ("1947 Official Statement") and explains the status of the Omaha Electric Committee and the former Iowa properties of Nebraska Power Company. In 1946, when OPPD entered into the stock purchase agreement with the Omaha Electric Committee, Nebraska law did not authorize the ownership by a public power district of any substantial properties outside the state of Nebraska. This fact is explained in the second paragraph on page 8 of the 1947 Official Statement. That paragraph of the 1947 Official Statement further explains the manner of handling the Iowa portion of Nebraska Power Company's business, as follows:

"As part of a plan to achieve the complete liquidation of all properties formerly owned by the [Nebraska Power] Company, the [Omaha Electric] Committee organized Western Iowa Power Company (sometimes hereinafter referred to as "Western"), in which the Committee holds all the common stock, and caused the [Nebraska Power] Company to transfer all of said properties in

Iowa east of the Missouri River to Western. The Committee also holds, or will receive, debt obligations of Western, as the result of the liquidation of such Iowa properties of the [Nebraska Power] Company in exchange for 7.7% of the common stock of the [Nebraska Power] Company."

Thus, as shown in the 1947 Official Statement (Attachment 2), the stock of Nebraska Power Company relating to the Company's ownership of the Iowa properties (7.7% of the total) was not sold to OPPD in 1946, but, rather, was retained by the Omaha Electric Committee. Furthermore, at the time of the execution of the stock purchase agreement with OPPD in 1946, the Omaha Electric Committee agreed, in paragraph 5 of the stock purchase agreement (Attachment 1), that, pursuant to the Committee's charter, the Committee would "dispose of the securities" of the newly created Western Iowa Power Company and would "transfer the net proceeds and all other assets of the Committee" to OPPD, less "any liabilities of the Committee."

The "winding up" process described in paragraph 5 of the stock purchase agreement was completed by June 30, 1949. Attachment 3 to this letter is the Official Statement for a \$5,000,000 bond issue by OPPD on or about August 1, 1949 (the "1949 Official Statement"). The first paragraph of page 5 of the 1949 Official Statement summarizes the transactions relating to the Iowa properties of the Nebraska Power Company. That paragraph states that: "All of the securities of Western Iowa Power Company were held by Omaha Electric Committee Inc., until May 14, 1949, at which time they were sold to the Iowa Power & Light Company for \$3,430,000."² Following the sale to Iowa Power & Light Company, the Omaha Electric Committee paid over to OPPD all of its funds after payment of expenses, as it had agreed to do in the September 1946 stock purchase agreement.

The transactions relating to the Iowa properties of Nebraska Power Company are further described in the notes to OPPD's consolidated balance sheet as of June 30, 1949, on page 30 of the 1949 Official Statement (Attachment 3).

In summary, the enclosed OPPD documents demonstrate that Aquila's assertion that OPPD assumed the obligations of Nebraska Power Company with respect to the Iowa properties is simply false. OPPD did not acquire any stock of the Nebraska Power Company relating to that Company's ownership of the Iowa properties east of the Missouri River. That portion of Nebraska Power Company's stock was retained by the Omaha Electric Committee, which organized a separate Iowa company, Western Iowa Power Company, to hold the Iowa properties pending their sale. The Western Iowa Power Company's stocks, bonds, and the Iowa properties were sold on May 13, 1949 to Iowa Power & Light Company.

Accordingly, as explained in this letter and shown in the enclosed attachments, OPPD is not the successor by merger to Nebraska Power Company with respect to any properties in Iowa east of the Missouri River, including the Council Bluffs MGP Site sold by Nebraska Power Company's alleged subsidiary, CGE, to Council Bluffs Gas Company in 1928.

² Iowa Power & Light Company is now part of Mid American Energy Company.

David L. Wornson, Esq.

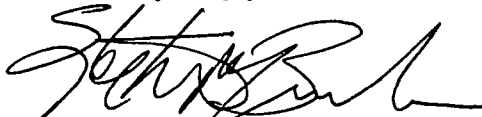
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We hope that this response adequately addresses the questions raised in your letter of March 31, 2003. OPPD would appreciate a written acknowledgement from the Department that it does not consider OPPD a potentially liable party with respect to the Council Bluffs MGP Site.

If you have any questions or you need any additional information, please do not hesitate to contact me.

Very truly yours,

A handwritten signature in black ink, appearing to read "Stephen M. Bruckner", written over a horizontal line.

Stephen M. Bruckner
FOR THE FIRM

SMB/bjs

Enclosures

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David L. Wornson, Esq.

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bcc: Bill Neal (*with attachments*)

Charles Moriarty (*with attachments*)